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Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

DISCUSSION KICK-OFF

Is a bird in the hand always worth two in the bush?

An assessment of the EU's New Approch Towards the Two-State Solution

IRIS CANOR — 13 September, 2017

This post inaugurates a new cooperation of Völkerrechtsblog with the "Leiden Journal of International Law". Firmly established as one of the leading journals in the field, the Leiden Journal of International Law (LJIL) provides a venue for sharp and critical voices that speak on the theory and practice of international law. It aspires to introduce or amplify refreshing and innovative approaches to perennial as well as topical issues in the field. The Journal's focus rests on

international legal theory, international law and practice, international criminal law, as well as international courts and tribunals. Authors of the LJIL will discuss their arguments with respondents here on the blog. We start with the first article from the 30/3 issue, "The EU's New Approach To the Two-State Solution in the Israeli-Palestinian Conflict: A Paradigm Shift or PR Exercise?" by Guy Harpaz with a response from Iris Canor.

The Core Arguments of the European Union's New Approach Towards Israel's Settlements Policy

Harpaz's article "The EU's New Approach Towards the Two-State Solution in the Israeli-Palestinian Conflict: A Paradigm Shift or PR Exercise?" evaluates the European Union's New Approach against the State of Israel's continuous breach of international law through its long-standing settlements policy in the Palestinian Territories. The European Union's (EU) New Approach intends for the EU to withhold economic benefits directly from companies and research institutions based in the Territories or operating therein, as well as from the products produced therein and from researchers who work in institutions situated therein. The Approach is new in the sense that it does not target the State of Israel directly but rather private individuals and companies operating from the Territories. Granted, the New Approach is yet another attempt on behalf of the EU to match its firm rhetoric against Israel's settlements enterprise in the Territories with concrete content; to enhance the EU normative power's identity; and to lend legitimacy to its external relations.

Arguing convincingly that the New Approach, although legal, "is misplaced in terms of public international law morality

and effectiveness", Harpaz is making a fine-contoured, limited and cautious argument that is both meticulous and rigorous. According to Harpaz, it is misplaced in terms of focus, not in terms of legality. He argues that the EU should have taken measures against the State of Israel as the principal promoter and primary architect of the settlements policy, rather than target the private corporations acting from the Territories, which are merely secondary operators. However, apart from the improbable full suspension of the EU-Israel trade agreement and the unlikely employment of instruments of negative conditionality, the article fails to engage in offering alternative politically feasible effective measures which the EU might have considered taking against the State of Israel.

The Legal Argument: Adherence to Public International Law and to European Union Law

Indeed it is not argued that the by targeting private actors rather than the state the EU is acting illegally. Yet the article does not put enough emphasis on the fact that the New Approach's legality is informed, as a matter of fact, by the obligations incumbent on the EU as stemming from international law. These obligations limit the discretion of the EU in pursuing its foreign policies. As hinted in the article, the New Approach corresponds to the a duty imposed also on the EU, at least indirectly, on behalf of Security Council Resolution 2334 of December 2016 which calls for the distinction between the State of Israel and the Territories. Hence, despite the fact that the New Approach predates the Resolution, it nevertheless fits squarely with its rationale and implements it. Obviously, the EU has a great stake in promoting adherence to the rationale behind this Resolution.

Moreover, the article does not sufficiently highlight the argument that the New Approach is mandated by European law. Arguably, the Court of Justice of the EU (CJEU) has ruled consistently that the EU trade agreements should not be interpreted as applying to occupied territories, thereby preferring the *de jure* to the *de facto* interpretation of the scope of application of such trade agreements. The CJEU has ruled explicitly, that the EU-Israel trade agreement does not apply to the Occupied Territories (C-386/08, Brita, para. 53). More recently, it ruled that the EU Morocco agreement does not apply to Western Sahara (Case C-104/16 P *Council of the European Union v Front Polisario*, para. 116). In accordance with these decisions, the EU is legally bound to take measures not to prejudice the realization of the *erga omnes* customary principle of the right of self-determination of the Palestinian peoples. The EU's insistence that its agreements with Israel will not apply extra-territorially can be perceived as designed to fulfil this obligation.

Finally, the New Approach upholds the EU obligation to sustain its endeavor to promote externally its foreign policy values in accordance with Article 3(5) TEU. The external insistence on EU values became more evident via the Lisbon Treaty. The EU wishes to become an ever more active player by externally upholding its own foreign policy values in a manner which goes beyond paying a purely symbolic lip service to them. Hence, disrespect and violation of the EU foreign policy values by foreign third states is expected to stimulate the exercise of political negative conditionality by the EU. It is further to be expected that the EU's foreign policy values will inform the EU willingness to withdraw or withhold its financial assistance programs to the detriment of certain individuals living in those third states, as preliminary measures prior to the more radical measure of

complete suspension or termination of such an agreement. The measures indeed taken are targeted and hence – possibly – more proportionate.

The Moral Argument: Better than nothing?

Harpaz's first critique of the New Approach first and foremost is a moral one. He argues that the principal facilitator and principal promoter of the settlements policies is the State of Israel and not corporations, which merely serve as secondary actors. Thus, it is the state – the primary actor – and the not the individuals – the secondary actor – that should bear international responsibility for the breach of international law. Yet, he argues, that while the EU treats Israel as an innocent bystander and confers upon it trade and trade related benefits, the New Approach focuses exclusively on private actors. This, he claims, might convey the message that it is only the corporations that are morally at fault. Further, he argues that such an approach is inconsistent with public international law that places the primary responsibility for breaches of international law in general, and of the laws of belligerent occupation in particular, on the responsible state, in this case, on Israel as the Occupying Power. The article also demonstrates that some European national courts, called upon to impose civil liability on corporations acting in or assisting the establishment of settlements in the Territories, have ruled that not every corporate presence in unlawful regimes amounts to an infringement of international law. These courts have referred to the responsibility of these corporations only as collateral.

Harpaz is right in underscoring the central role of the occupying state as the main architect of the settlements

policy. Yet, his point suggests a fairly conservative normative approach towards public international law according to which there should be a clear division between public authorities and private entities. Indirectly the article lends support to the view that the law of occupation may not be used in principle as a legal basis for imposing direct responsibility on individuals without the mediation of the state.

Indeed, arguing that it is legally and morally appropriate to apply international law directly against private persons and companies is not without problems. However, while the specificities of the crystallization of an international responsibility of individuals, beyond international criminal law, are still in flux, it might nevertheless be maintained that public international law has evolved to the point of granting certain rights to individuals but also imposing duties on them. Therefore, individuals may be held responsible for the violation of certain norms of international law. This responsibility may be enforced directly against them. Beyond the attempts to enforce individual liability via civil lawsuits in domestic courts, it has become possible for foreign public authorities to take direct international (economic) sanctions against individuals who violate duties incumbent on them under public international law.

Admittedly, the prohibition on the transfer of civilian population to occupied territories is imposed by international law on the occupying power. However, courts have already established in the past that provisions directed towards states may nevertheless produce direct effect. An argument could therefore be made that the corporations' operation from such territories is contrary to public international law. This is even more true today. Assuming

settlers initially could have pointed to their passive role as opposed to the active encouragement, organization and facilitation by the state in order to dismiss or minimize their responsibility, this might no longer be the case. By now there is almost no serious argument put forward which claims that the Israeli settlements in the Territories are legal under international law (even the Israeli government was reluctant to endorse publicly the "Report on the Legal Status of Building in Judea and Samaria" which was commissioned by it, and which reached the conclusion that the Israeli settlements are legal under international law; but note the recent Judea and Samaria Settlement Regulation Law which is pending constitutional review by the Israeli Supreme Court). Given the duration of the violation and the foreseeability of the content of the prohibition, corporations located in the Territories would not be able to argue convincingly that they were unaware of their contribution to the breach. The corporations' choice to remain in the Territories and to continue to operate commercially from them may be perceived as a meaningful contribution to the further maintenance and prolongation of these violations.

Thus it might be maintained that the state and the corporations are acting jointly and as collaborators in perpetuating the breach. The state would not be able to consummate the settlements enterprise without the corporations' readiness to stay there. While admittedly the state's continuous support is a *sine qua non* element for upholding the settlements enterprise, the corporations are presumably shouldering international duties, which transcend the national obligation of obedience to their state. Therefore, an argument might be put forward that these corporations are internationally liable and should not be able to hide behind the protective shield of the state.

Indeed, applying a systematic order to the shared responsibility of collaborators is not an easy task. However, even if one is willing to follow the ranking, namely that the state is the primary actor and the corporations are secondary, it may nevertheless be argued that even while one entity (namely the EU) cannot go against the primary actor, it still may proportionally pursue the secondary actor. As shared responsibility should imply shared accountability, secondary actors might still be held accountable for their part of the breach of international law. Given the enduring European political impasse towards the acts of the State of Israel (as explained by Harpaz: for historical reasons relating to the Holocaust, for economic interests in Israel's diversification of international trade, and for political considerations linked to US support of Israel), European denial of economic aid from these corporations should not necessarily be condemned as illegitimate. Desirability is not denied but neither is feasibility.

The Effectiveness Argument: Anything is better than Nothing

The second main critique pointed out regarding the New Approach is its ineffectiveness. In a nutshell, it is argued that the measures taken directly against the corporations acting in the Occupied Territories will not have the desired impact on Israel's policies. This is so because the hard core of the settlement movement is highly ideological and committed, willing to pay the price (which is perceived as *de minimis*) for the realization of its religious-nationalistic beliefs. Moreover, according to Harpaz, measures which only target individuals in the Territories are perceived as nonsignificant from a national perspective: Israel remained committed to its settlement policy and even became more devoted to entrenching it. Sanctions against the corporations in the

Territories did not manage to induce Israelis within the "Green-Line" to exert pressure on the Israeli government to change its policy towards the Occupied Territories; and the EU's New Approach did not inspire other international organizations to follow in the EU's footsteps.

Harpaz is certainly right regarding the low potential of the New Approach to mobilize the majority of the Israeli society against the settlements. It is, however, unclear whether the New Approach is truly insignificant in demonstrating that violations of public international law might be costly. Israeli corporations, which moved to the Territories not for ideological but for economic reasons, might reconsider this move and pull out. Indeed, efforts have already been made by some companies in light of the New Approach to withdraw from the Territories. Additionally, by asking the State of Israel for compensation for the loss these corporations claim to suffer from the New Approach, the corporations also demonstrate that they are unwilling to tolerate the economic cost of operating from the Territories. Finally, the outcry provoked by the *Boycott, Divestment and Sanctions* Movement (BDS Movement) implies that the burden the settlements might need to shoulder is by no means negligible. Hence, the New Approach is likely to exert effective pressure.

A Critical Observation Regarding Arbitrariness

A pertinent moral point in Harpaz's article, which is unfortunately only mentioned *in passing*, is the discriminatory manner in which the EU applies its policy of taking international measures against individuals who commit serious breaches of international law. It has been argued that the EU does not take similar measures against

Moroccan corporations acting from the territories of Western Sahara. The scope of the EU restrictive measures against Russia in response to the annexation of the Crimea may also be examined along the same criteria. Should the case be made that the EU adheres to unjustifiably different standards, this is a cause of concern: selective adherence to international law undermines the moral basis of legal compliance. Such an unwarranted and arbitrary manner of enforcing international law will justify an argument on behalf of corporations, located in the Territories, that the EU New Approach amounts to a malicious action targeted uniquely against them while other secondary actors performing similar breaches of international law in comparable situations are ignored. Such alleged arbitrariness, which would amount to an abuse of process on behalf of the EU, might seriously undermine the normative legitimacy to which the EU so much aspires.

No Silver Bullet

By concentrating on exerting direct pressure on the corporations operating from the Territories, the New Approach is by no means a silver bullet solution to bringing to an end the Israeli settlements enterprise, let alone to solving the complex Israeli-Palestinian conflict. Yet, the EU willingness proactively to undertake measures against individuals for violation of international legal obligations may altogether be welcome. The limited practical advantages and the effectiveness of such targeted measures and the modest pressure such measures exert are undeniably cause for concern. The EU might be accused of simply taking a symbolic measure against a serious problem. Preferably, as the article convincingly argues, pointing out the direct international legal responsibility of the corporations should

have been embedded in wide-ranging international measures against the State of Israel as the main initiator and the decisive bearer of responsibility for the illegal policy.

But the New Approach may be regarded as serving two important goals. First, it further accentuates international awareness of the seriousness of the breach of international law as exercised by the settlements policy (especially as a counterweight to Israeli Supreme Court's recent turn towards Israeli law rather than public international law when called upon to examine the legality of Israel's policy in the Territories). Second, it might nevertheless encourage at least some private actors and companies to sever their contacts with the Territories, and deter others from moving to the Territories. Despite all its deficiencies, the New Approach may therefore be perceived as an inspiring effort on behalf of the EU to conduct at least a rear-guard action in the face of a stubborn, persistent and serious breach of international law.

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